IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RENE RAMIREZ ORNELAS,
Appellant.

No. 2 CA-CR 2022-0006
Filed February 1, 2023

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20203557001
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

Kris Mayes, Arizona Attorney General
Alice Jones, Acting Deputy Solicitor General/Section Chief of Criminal Appeals
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Megan Page, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Eckerstrom authored the decision of the Court, in which Chief Judge Vásquez and Judge Sklar concurred.

E C K E R S T R O M, Presiding Judge:

¶1 Rene Ornelas appeals from his convictions and sentences for two counts of aggravated assault. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts, resolving all reasonable inferences against Ornelas. *See State v. Kindred*, 232 Ariz. 611, ¶ 2 (App. 2013). In July 2020, R.A. and his pregnant significant other were delivering food to a friend's shed in the backyard of a Tucson residence. Ornelas entered the shed, became upset with R.A., and abruptly struck him twice with a machete, once on the wrist and once above the knee. Ornelas "took off running" and then left on a bicycle. Two people tried to chase him down on foot, but he escaped. Approximately two months later, Tucson police located and arrested him.

¶3 The machete sliced through most of R.A.'s wrist, such that his hand was "hanging off," connected only by two tendons, and required reconstructive surgery. He also underwent surgery on the injury to his thigh, requiring a screw to keep his kneecap in place. R.A. continues to experience physical, emotional, and financial effects as a result of the attack. He can no longer jog or run, has reduced grip strength, and suffers "constant pain trying to work physically," such that he can no longer perform manual labor, his previous vocation. He struggles to use the restroom alone, to groom and clean himself, and otherwise requires assistance in ways he did not before his injuries. He also hesitated to hold his newborn daughter and his other child, which caused him great sadness. R.A. and his family are in therapy because of the attack.

¶4 The state charged Ornelas with two counts of aggravated assault on R.A.: (1) deadly weapon or dangerous instrument (the machete) under A.R.S. § 13-1204(A)(2); and (2) serious physical injury under § 13-1204(A)(1). The state alleged the charged offenses were of a

dangerous nature, that Ornelas had prior convictions, and that R.A. had suffered physical, emotional, or financial harm as a result of Ornelas's conduct. At the conclusion of a four-day trial, a jury found Ornelas guilty as charged. It found that the state had proven beyond a reasonable doubt both that the crimes had been of a dangerous nature and that R.A. had suffered the harm alleged.

¶5 Ornelas filed a motion for a new trial. After a hearing, the trial court denied the motion. Upon finding that Ornelas had three prior felony convictions, the court sentenced him to concurrent, presumptive, 11.25-year prison terms. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Unexpected Testimony

¶6 During cross-examination, defense counsel asked R.A.'s significant other, C.F., what person or people had informed her that the instrument used in the attack was a machete. She volunteered that Ornelas had hit "other people . . . with a machete" and that R.A. had not been "the first person that he hit with a machete." Defense counsel asked to approach the bench, and the trial court called a recess.

¶7 When the parties returned, defense counsel moved for a mistrial. He argued that the testimony—which had not been provided during any pretrial interviews in response to similar questions—amounted to other-act evidence, hearsay, and propensity evidence. He urged that there was "really no way to unring this bell" or "to erase that [testimony] from [the jurors'] minds," such that a limiting instruction would be insufficient and only a mistrial would suffice. Confirming that the testimony had come as a surprise, the state countered that it had resulted from defense counsel's open-ended question and did not require a mistrial because it could be addressed with a curative instruction.

¶8 After reviewing a preliminary copy of the transcript of C.F.'s testimony, the trial court denied the motion for a mistrial. It reasoned that, although the unexpected testimony had clearly been "improper," it was not "so unfairly prejudicial" that the "very drastic measure" of a mistrial was required. The court also noted: the testimony had been "brought out through the defendant's questioning" and was "somewhat isolated" due to the recess; a curative instruction and a request to strike the testimony would both be entertained; and the state should instruct C.F. and any other witnesses to "stay away from that topic" and not mention it during closing.

¶9 The defense requested the opportunity to voir dire C.F. outside the jury's presence. The trial court granted the request, explaining to C.F. that although evidence regarding Ornelas having hit other people with a machete was "not relevant or admissible in this trial at this point," it had granted the defense permission to ask a few related questions. When asked for the basis of her testimony, C.F. explained that, after R.A. was injured, she "bumped into" other people who told her that they or others had also suffered machete wounds inflicted by Ornelas, including "fresh" injuries she could still see. The defense then objected to C.F.'s original testimony as hearsay and asked that it be stricken, but requested that the court provide a generic instruction rather than specifically referencing the stricken language. The state objected, arguing that the instruction should be more specific to clue the jury in on "exactly what the statement is they're supposed to strike." The court overruled the state's objection. It also ordered C.F. to "stay away from any testimony about any other bad or prior acts . . . especially with a machete that you're aware of with the defendant."

¶10 Upon its return, before cross-examination resumed, the trial court instructed the jury as follows: "Shortly before our lunch break, this witness testified about some prior acts. The Court has determined that there is no foundation for that testimony, that it was based on hearsay. The Court is striking that testimony, and I am ordering you to disregard it." During the settling of jury instructions, Ornelas asked for an instruction that evidence does not include stricken statements but then agreed that the following instruction was sufficient: "If testimony was ordered stricken from the record, you must not consider that testimony for any purpose." The jury was later so instructed.

¶11 After the jury convicted Ornelas, he filed his motion for a new trial, based in part on C.F.'s stricken testimony. He contended he had been denied a fair trial because, despite the trial court's best efforts, the jury could not be expected to ignore C.F.'s improper testimony. The state responded that striking the testimony and ordering the jury to ignore stricken testimony had been sufficient to cure the problem. After hearing argument on the motion, the court denied Ornelas's request for a new trial. It adopted the state's argument and incorporated its own reasoning as articulated during the trial. It further found that, although the trial had not been perfect, it had been fair and the evidence was "pretty strong," involving three eyewitnesses who testified that Ornelas "was there" and "did this."

¶12 Ornelas contends the trial court erred by not granting a mistrial or new trial after C.F. "blurted out" that Ornelas "had supposedly attacked other people with a machete." He argues that the evidence was "too closely related to the charged offense to be ignored by the jurors even if they did their best to follow the trial court's instructions." He urges that, because the testimony "went exactly" to the issue of whether Ornelas had attacked R.A. with a machete and thus "inevitably biased the jury against the defense theory" that the eyewitness testimony was unreliable, a mistrial or new trial should have been granted and a new trial is now required.

¶13 We review a trial court's denial of a mistrial and of a motion for a new trial for an abuse of discretion. *State v. Gulbrandson*, 184 Ariz. 46, 62 (1995). "An abuse of discretion occurs when 'the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice.'" *State v. Arellano*, 213 Ariz. 474, ¶ 14 (2006) (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983)). Ornelas has not established such abuse here.

¶14 "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262 (1983). As our supreme court has repeatedly explained, "[w]hen a witness unexpectedly volunteers an inadmissible statement, the action called for rests largely within the discretion of the trial court" to "evaluate the situation and decide if some remedy short of mistrial will cure the error." *Id.; see also State v. Miller*, 234 Ariz. 31, ¶ 25 (2013) (quoting *Adamson*). This is because the trial judge—who "is able to sense the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial"—is "always in the best position to determine whether a particular incident calls for a mistrial." *State v. Koch*, 138 Ariz. 99, 101 (1983); *see also State v. Valdez*, 167 Ariz. 328, 332 (1991) ("trial judge is in the best position to determine whether or not to grant a new trial" and decision "will not be disturbed absent a showing of abuse").

¶15 Here, even assuming the challenged testimony was inadmissible,[1] the trial court took multiple steps to ensure it did not

[1]Because we affirm on other grounds, we need not reach the state's arguments—which it raises for the first time on appeal—that, contrary to the trial court's clear finding of inadmissibility, the challenged testimony was invited or "not inadmissible."

influence the jury. After granting Ornelas's request to voir dire C.F., the court ordered her to "stay away from any testimony about any other bad or prior acts." When the jury returned, the court struck the testimony and instructed the jurors—in the form Ornelas had requested—to disregard it. At the beginning of the trial, the court had explained to the jury that, if certain testimony was ordered stricken from the record during trial, the jury was required to disregard it and could "not consider that testimony for any purpose." The court repeated that requirement during final jury instructions, again providing the form of instruction Ornelas had approved. "Jurors are presumed to follow the judge's instructions." *State v. Morris*, 215 Ariz. 324, ¶ 55 (2007). Absent an indication otherwise, "we will not speculate on whether the jury considered stricken evidence" in deliberating and returning its verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 22 (App. 2005).

¶16 When ruling on the motion for mistrial, the trial court articulated its reasons for concluding that, although the challenged testimony had been improper, it could be remedied and did not require a mistrial. *See State v. Dann*, 205 Ariz. 557, ¶ 46 (2003) (affirming denial of mistrial because trial judge viewed improper statement in context of other evidence, assessed its impact on jury, and determined limiting instruction—to which defense did not object—to be sufficient in light of all circumstances). Although we acknowledge that evidence of other acts can be extraordinarily prejudicial, *see State v. Conley*, No. 2 CA-CR 2021-0111, ¶¶ 14, 20, 2023 WL 329233 (Ariz. Ct. App. Jan. 20, 2023), the court also found that the properly admissible evidence of guilt was strong and that the trial was fair overall, *see Adamson*, 136 Ariz. at 263-64. The court was in the best position to make those determinations. We find no abuse of discretion in either its denial of Ornelas's motion for a mistrial or its denial of his related motion for a new trial. *See State v. Almaguer*, 232 Ariz. 190, ¶¶ 27, 29 (App. 2013) (affirming trial court's denial of mistrial in similar circumstances); *see also Valdez*, 167 Ariz. at 332 (affirming denial of new trial where no abuse of discretion).

Challenged Photographs

¶17 When asking R.A. about his injuries, the state showed him seven photographs. Ornelas objected to two of them—Exhibits 14 and 48—as "excessive." He explained that multiple photographs of the same injuries "become cumulative" and that the two challenged exhibits in particular "show[ed] the skin pulled back from the wound in such a way to make it look gorier than it normally would," such that they were more prejudicial than probative. Arguing that the two exhibits were not

cumulative because there were only seven photographs of R.A.'s injuries in total, the state moved to admit all seven. The trial court overruled Ornelas's objection and admitted the photographs, permitting the state to publish them to the jury and, ultimately, send them into the deliberation room.

¶18 On appeal, Ornelas contends the trial court erred by admitting two "inflammatory pictures" of R.A.'s partially severed hand, which he claims "were cumulative" and "contributed nothing" to the state's evidence. He claims it is "clear" that the only reason the challenged exhibits were admitted "was to inflame the jury." Because Ornelas preserved the issue by raising it below, we review for harmless error. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005).

¶19 We, too, are skeptical that the two challenged exhibits were properly admitted. *See State v. Rushing*, 243 Ariz. 212, ¶ 25 (2017) (propriety of trial court's admission of gruesome photograph turns on relevance, tendency to inflame jury, and probative value compared to potential to cause unfair prejudice). Although relevant, the two photographs were not meaningfully used to illustrate any testimony[2]—which, in any case, was clear and undisputed on the extent of R.A.'s injuries. Nor was either photograph necessary to satisfy any particular element the state was required to prove, in view of the admission of other photographs of the injuries and R.A.'s testimony regarding their seriousness.[3] *See Chapple*, 135 Ariz. at 288-89 (even if relevant, gruesome photographs with no tendency to prove or disprove any question actually contested "have little use or purpose except to inflame" and "would usually not be admissible"); *see also State v. Jones*, 203 Ariz. 1, ¶ 30 (2000) (graphic, disturbing photographs that added nothing to testimony "at best cumulative and at worst offered in an attempt to incense the jurors").

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[2]After R.A. described in some detail the injury to his hand depicted in Exhibit 11, the state asked him only whether Exhibit 14 was "another picture of [his] wrist." He confirmed, "Yes." The state then moved on to questions regarding Exhibit 15—"another view of the injury"—which Ornelas has not challenged either below or on appeal. As the state concedes, Exhibit 48 "was not mentioned during the testimony."

[3]In its closing argument, the state mentioned Exhibit 14 only alongside Exhibit 13 as demonstrating "what you would expect if you got hacked by a machete." It made no reference to Exhibit 48.

¶20 Although the marginal probative value of the additional photographs was arguably outweighed by their prejudicial impact, we are equally skeptical that any such prejudice could have affected the outcome of the trial. Several other photographs of the same injury, most of them similarly gruesome, were admitted without objection and published to the jury. The testimony also included graphic descriptions of R.A.'s injuries and blood that "just started spraying like something out of a horror movie." Thus, the two duplicative photographs in question did not expose the jury to anything more gruesome than what they had already seen and heard, and they are unlikely to have materially inflamed the jury beyond what the unchallenged photographs and admissible testimony achieved. *See Rushing*, 243 Ariz. 212, ¶ 31. Moreover, the state did not meaningfully draw the jury's attention to the two challenged photographs during either its examination of witnesses or its summation. We therefore conclude that any error was harmless because it did not contribute to or affect the jury's verdicts. *See Jones*, 203 Ariz. 1, ¶ 33.

Flight Instruction

¶21 Over Ornelas's objection, the trial court provided a final instruction that, in determining whether the state had proved Ornelas guilty beyond a reasonable doubt, the jury was permitted to "consider any evidence of [his] running away" and his "reasons for running away," although running away after a crime has been committed "does not, by itself, prove guilt." After trial, Ornelas raised this flight instruction as one of his grounds in his motion for a new trial. As noted above, the court denied that motion.

¶22 On appeal, Ornelas again contends the trial court erred by giving the flight instruction. He claims "there was insufficient evidence to support the giving of a jury instruction on the use of flight as evidence of consciousness of guilt." He bases this claim on testimony from one witness that Ornelas had run from the scene when someone chased him and threw rocks at him and that this had occurred before the police were called. He further argues that he never left Tucson, did not alter his appearance or otherwise attempt to conceal himself or his identity, and cooperated with police when they approached him two months after the incident, rather than running away.

¶23 "We review the trial court's decision to give a flight instruction for abuse of discretion." *State v. Parker*, 231 Ariz. 391, ¶ 44 (2013). A trial court may give such an instruction only if the state has presented evidence of the defendant's flight from which jurors could

reasonably "infer 'consciousness of guilt for the crime charged.'" *Id.* (quoting *State v. Edwards*, 136 Ariz. 177, 184 (1983)); *see also State v. Solis*, 236 Ariz. 285, ¶ 7 (App. 2014). "The 'slightest evidence' is sufficient" to justify a jury instruction. *State v. Almeida*, 238 Ariz. 77, ¶ 9 (App. 2015) (quoting *State v. King*, 225 Ariz. 87, ¶ 14 (2010)). A trial court considering whether to provide a particular instruction "does not weigh the evidence or resolve conflicts in it." *Id.* Rather, the court merely decides whether the record provides evidence upon which the jury could reasonably make the required finding, *id.*—here, flight indicating consciousness of guilt.

¶24 As Ornelas concedes, three eyewitnesses testified that R.A.'s attacker—whom they all unequivocally identified as Ornelas—had fled immediately after the incident. This evidence that Ornelas had openly raced away from the scene of the crime was a sufficient basis for the court to provide the flight instruction. *See State v. Smith*, 113 Ariz. 298, 300 (1976) (flight instruction appropriate if evidence "supports a reasonable inference that the flight . . . was open, such as the result of an immediate pursuit"); *State v. Lujan*, 124 Ariz. 365, 371 (1979) (although merely leaving scene of crime not evidence of flight, running away from scene of stabbing immediately after it occurred sufficient "evidence of a guilty conscience" to permit flight instruction).

¶25 Ornelas's argument that he fled because he was being chased and having rocks thrown at him does not render the flight instruction improper. A defendant's explanation for his flight does not preclude a flight instruction; "[i]t simply create[s] a fact question for the jury to decide." *Parker*, 231 Ariz. 391, ¶ 50. Nor are we persuaded by Ornelas's arguments that any flight occurred before the police were called or that his behavior after the incident did not involve concealment or flight. "[N]either pursuit by law enforcement nor complete concealment is required to support a flight instruction." *Id.* ¶ 48; *see also State v. Hunter*, 136 Ariz. 45, 49 (1983) (defendant's lack of attempt to conceal himself when later approached by police immaterial, as "either fleeing the scene as upon open pursuit or concealment is sufficient to support a flight instruction" and "not necessary that both factors be present"). There was no abuse of discretion in the trial court's provision of the flight instruction.

Disposition

¶26 For all the foregoing reasons, we affirm Ornelas's convictions and sentences.